



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VIASAT, INC., a Delaware corporation,  
Plaintiff and Counter-Defendant,  
v.  
ACACIA COMMUNICATIONS, INC., a  
Delaware corporation,  
Defendant and Counter-Claimant.

Case No.: 3:16-cv-00463-BEN-JMA

**ORDER DENYING PLAINTIFFS' EX  
PARTE APPLICATION FOR LEAVE  
TO FILE A SUR-REPLY**

**[Doc. No. 113]**

On February 15, 2018, Plaintiff ViaSat, Inc. ("ViaSat") filed an *Ex Parte* Application for Leave to File Sur-Reply. Acacia Communications, Inc. ("Acacia") filed an Opposition. (Doc. No. 114.) Courts generally view motions for leave to file a sur-reply with disfavor. *Hill v. England*, 2005 WL 3031136, at \*1 (E.D. Cal. Nov. 8, 2005). However, permitting the filing of a sur-reply is within the discretion of the district court. *Schmidt v. Shah*, 696 F. Supp. 2d 44, 60 (D.D.C. 2010) ("The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the court." "Although the court in its discretion [may] allow the filing of a sur-reply, this discretion should be exercised in favor of allowing a sur-reply only where a valid reason for such additional briefing exists." *Johnson v. Wennes*, No. 08-cv-1798, 2009 WL 1161620, at \*2 (S.D.

1 Cal. April 28, 2009). Neither the federal rules nor the local rules permit a sur-reply as a  
2 matter of course.

3 ViaSat contends its sur-reply is necessary to enable it to respond to Acacia's false  
4 allegations asserted in their Reply in Support of the Motion for Partial Summary  
5 Judgment. (Doc. No. 109.) Specifically, Acacia's accusation ViaSat "materially  
6 misleading this Court" by citing *Digital Envoy, Inc. v. Google, Inc.*<sup>1</sup> ("*Digital Envoy I*")  
7 without also referencing the court's January 24, 2006 order<sup>2</sup> ("*Digital Envoy II*") as well.  
8 ViaSat further alleges Acacia's Reply materially changes one of the grounds of its  
9 Motion for Partial Summary Judgment. (Doc. No. 75.)

10 Acacia argues ViaSat's proposed Sur-Reply focuses on an issue, the  
11 reconsideration decision of the court in *Digital Envoy II* – that ViaSat could (and should)  
12 have cited in its Opposition, instead of simply discussing *Digital Envoy I*. When ViaSat  
13 neglected to address *Digital Envoy II* in its reply, Acacia was compelled to do so in its  
14 response.

15 Having reviewed the parties' memoranda and with a firm grasp of their asserted  
16 positions, the Court does not find a valid reason to allow ViaSat to file its Sur-Reply.  
17 To begin with, the Court disagrees with ViaSat's characterization of Acacia's reply as  
18 misleading, or that it materially changes one of the grounds of its Motion for Partial  
19 Summary Judgment. In the Court's view, Acacia's reply simply responds to the  
20 arguments ViaSat raises in its opposition, which is in keeping with the nature and  
21 purpose of a reply. Specifically, Acacia provides a counter response to ViaSat's  
22 allegations. The Court finds ViaSat's request for leave to file a sur-reply as more of an  
23 attempt to have the last word on this issue instead of identifying new issues raised for the  
24 first time in the reply. This is precisely why Courts so thoroughly disfavor requests to  
25 file sur-replies.

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27 <sup>1</sup> *Digital Envoy, Inc. v. Google, Inc.*, 2005 WL 29993364 (N.D. Cal. Nov. 8, 2005)

28 <sup>2</sup> Doc. No. 109-2, Ex. 89 ("*Digital Envoy II*")

1        Going forward, the Court suggests the parties put aside whether this exercise was  
 2 necessary, or whether the Court's resources are best spent policing the scope of the  
 3 parties' already-voluminous filings. *See Mission Power Eng'g Co. v. Cont'l Cas. Co.*,  
 4 883 Supp. 488, 491-92 (C.D. Cal. 1995) ("When an *ex parte* motion is filed ... the judge  
 5 drops everything," expecting that the "tomatoes are about to spoil or the yacht is about to  
 6 leave the jurisdiction and that all will be lost unless immediate action is taken."). The  
 7 parties seem to have forgotten that "A district court may refuse to consider new  
 8 [arguments or] evidence submitted for the first time in a reply if the evidence should have  
 9 been presented" earlier. *See Wallace v. Countrywide Home Loans, Inc.*, SACV 08-1463  
 10 AG (MLGx), 2009 WL 4349534, at \*7 (C.D. Cal. Nov. 23, 2009); *cf. Provenz v. Miller*,  
 11 102 F.3d 1478, 1483 (9th Cir. 1996.) To avoid the additional acrimony, cost, and effort  
 12 of filing a sur-reply (and the potential request to file a sur-sur-reply), the Court will  
 13 simply exercise its discretion to ignore any improper material that may or may not have  
 14 been included in the papers. Three rounds of briefs are enough. Replies to replies to  
 15 replies are too much.

16        Accordingly, the Court hereby **DENIES** ViaSat's *Ex Parte* Application for Leave  
 17 to File a Sur-Reply. The Motion for Partial Summary Judgment remains under  
 18 submission.

19        **IT IS SO ORDERED.**

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 21 Dated: June 25, 2018

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 23 Hon. Roger T. Benitez  
 24 United States District Judge  
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